

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

10 JOSHUA VENTURES INTERNATIONAL INC., )  
11 vs. Plaintiff, ) Case No. 2:05-cv-01018-PMP (GWF)  
12 CLARE MORSE, et al., )  
13 Defendants. )  
14

16 This matter is before the Court on *Emergency* Plaintiff's Motion For Order of Contempt and  
17 Sanctions Against Defendant Morse Pursuant to FRCP 37 (#30), filed on March 14, 2007; Pro se  
18 Defendant Clare Morse's Motion to Establish Date For Deposition ad Affidavit Re: Deposition (#34),  
19 which was faxed to the Court on March 15, 2007 and filed on March 19, 2007; and Plaintiff's  
20 Supplement to *Emergency* Plaintiff's Motion For Order of Contempt and Sanctions Against Defendant  
21 Morse Pursuant to FRCP 37 (#36), filed on March 21, 2007. The Court conducted a hearing on this  
22 matter on March 21, 2007, at which time attorney Matt Pawlowski, Esq. appeared on behalf of  
23 Defendant Morse.

## BACKGROUND

On February 26, 2007, the Court granted Plaintiff's Motion for Order to Compel Against Defendant Morse and For Sanctions Pursuant to FRCP 37 (#26) for Defendant's failure to appear for

1 his properly noticed deposition on December 18, 2006.<sup>1</sup> Plaintiff previously noticed the deposition of  
2 Defendant Clare Morse in June 2006. In response to that notice, Defendant filed a motion for  
3 protective order (#16) stating that he was unable to appear for his deposition due to bodily injuries he  
4 sustained after being bucked off a horse. Due to Defendant's reported medical condition, Plaintiff  
5 agreed to postpone his deposition until he was medically able to attend a deposition and the Court  
6 granted extensions of the discovery cut-off date in light thereof. Plaintiff subsequently learned that  
7 Defendant Morse was ambulatory and renoted his deposition for December 18, 2006. Prior to that  
8 date, Plaintiff rejected Defendant Morse's requests, through his Utah attorney (who has not appeared as  
9 counsel in this action), to further postpone Mr. Morse's deposition. Defendant Morse did not appear  
10 for his scheduled deposition on December 18, 2006. The Court therefore granted Plaintiff's Motion to  
11 Compel Defendant Morse to appear for his deposition on or before March 21, 2007. *See Order* (#29),  
12 filed on February 26, 2007. The Court also awarded Plaintiff sanctions in the amount of \$2,000 for  
13 attorney's fees and \$115 in costs incurred in scheduling the deposition that Defendant Morse did not  
14 attend and in pursuing the motion to compel. The Court further stated in its order (#29) that if  
15 Defendant Morse did not appear for his deposition, the Court would recommend that his answer and  
16 counterclaim be stricken and his default may be entered.

17 Pursuant to the Court's order (#29), Plaintiff's counsel renoted Defendant Morse's deposition  
18 for March 14, 2007 at 1:00 p.m. and served notice of the deposition by mail on February 26, 2007 and  
19 also faxed the notice of deposition to Defendant Morse that same day. According to Plaintiff's counsel  
20 on March 13, 2007, he faxed a letter to Defendant Morse, notifying him of Plaintiff's new office  
21 address and advising him that the deposition would go forward as scheduled on March 14th. On March  
22 14, 2007, Plaintiff's counsel received a telephone call from an unlicensed Utah attorney at  
23 approximately 10:15 a.m. who advised that Defendant Morse had received Plaintiff's counsel's March  
24 13th letter, and had also received the Court's order (#29), but stated that Defendant did not receive the  
25 prior notice of his deposition for March 14, 2007, which had been previously served by mail and

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27       <sup>1</sup>Defendant Morse did not file a response to Plaintiff's Motion for Order to Compel Against  
28 Defendant Morse and For Sanctions Pursuant to FRCP 37 (#26) or appear at the hearing on that motion  
on February 23, 2007.

1 facsimile transmission. The Utah attorney also stated that Defendant Morse believed that he had until  
 2 March 21, 2007 to appear for his deposition. Believing that Defendant Morse was simply continuing  
 3 to stall the taking of his deposition and that he had no good faith reason for not appearing for his  
 4 deposition on March 14, 2007, Plaintiff's counsel refused to postpone the deposition and filed the  
 5 instant emergency motion for an order of contempt and sanctions against Defendant Morse.

## DISCUSSION

7 Pursuant to the Court's statement in its February 26, 2007 order (#29), Plaintiff requests that the  
 8 Court impose the severe sanction of striking Defendant Morse's answer and counterclaim and entering  
 9 his default pursuant to Fed.R.Civ.Pro. 37(b) (C) for his failure to appear for his deposition on March 14,  
 10 2007. In regard to imposition of the severe sanction of dismissal or default, *Henry v. Gill Industries*,  
 11 983 F.2d 943, 948 (9th Cir. 1993) states:

12 "Because the sanction of dismissal is such a harsh penalty, the district  
 13 court must weigh five factors before imposing dismissal: (1) the public's  
 14 interest in expeditious resolution of litigation; (2) the court's need to  
 15 manage its dockets; (3) the risk of prejudice to the party seeking  
 16 sanctions; (4) the public policy favoring disposition of cases on their  
 17 merits; and (5) the availability of less drastic sanctions." *Porter v.  
 Martinez*, 941 F.2d 732,733 (9th Cir. 1991) (citations and internal  
 punctuation omitted).

18 The first two factors favor the imposition of sanctions in most cases, while the fourth factor cuts  
 19 against a dismissal or default sanction. Thus, the key factors are prejudice and the availability of lesser  
 20 sanctions. *Henry*, 983 F.2d at 948, citing *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir. 1990).  
 21 For dismissal to be proper, the conduct to be sanctioned must also be due to willfulness, fault or bad  
 22 faith by the losing party. *Henry*, 983 F.2d at 947-48, citing *Fjelstad v. American Honda Motor Co.*, 762  
 23 F.2d 1334, 1337 (9th Cir. 1985); see also *Valley Engineers Inc. v. Electric Engineering Company*, 158  
 24 F.3d 1051 (9th Cir. 1998); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348  
 25 (9th Cir. 1995) (applying same test under court's inherent power to sanction); and *Leon v. IDX Systems  
 Corp.*, 464 F.3d 951 (9th Cir. 2006) (applying same test under court's inherent power to sanction). In  
 26 deciding whether dismissal or default is warranted, the court may consider all of the offending party's  
 27 discovery conduct. *Henry*, 983 F.2d at 947, citing *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1411  
 28 (9th Cir. 1990). The severe sanction of dismissal or default may imposed, in appropriate

1 circumstances, based on a party's repeated failure to appear for his deposition. *Henry, supra.*

2 In this case, Defendant Morse's failure to appear for his deposition on March 14, 2007,  
3 combined by his previous failure to appear for his deposition on December 18, 2006, justifies a finding  
4 of willful or bad faith misconduct. Defendant has offered the Court no reason to believe, other than his  
5 say-so, that he did not receive the notice of deposition for March 14, 2007 that Plaintiff's counsel both  
6 mailed and faxed to him on February 26, 2007. If Defendant Morse did not receive the notice for his  
7 deposition on March 14, 2007, which the Court seriously doubts, he might have been confused by the  
8 Court's order (#29) regarding the date he was required to appear for his deposition. On the morning of  
9 March 14, 2007, an attorney for Defendant Morse, who is reportedly unlicensed, contacted Plaintiff's  
10 counsel and attempted to postpone the deposition to March 21, 2007 which was within the deadline  
11 imposed by the Court for Defendant Morse to appear for his deposition. Thus, Defendant's failure to  
12 appear for his deposition is ameliorated to some degree by his alleged willingness to appear one week  
13 later on March 21st. In its February 26, 2007 order (#29), the Court reopened discovery until April 14,  
14 2007 to complete the deposition of Defendant Morse. Therefore, allowing Mr. Morse's deposition to  
15 be taken prior to that date will not delay the discovery completion schedule or other pretrial deadlines in  
16 this case.

17 Plaintiff and its counsel, however, have once again been clearly inconvenienced, and to some  
18 extent prejudiced, by Defendant's failure to comply with his discovery obligations and the Court's order  
19 that he appear for his deposition. Although grounds exist to find willful and bad faith conduct by  
20 Defendant Morse, his misconduct, and the prejudice to Plaintiff is not so great, as to justify imposition  
21 of severe sanction of striking his answer and counterclaim. The Court also gives some consideration to  
22 Defendant Morse's status as a *pro se* litigant in determining the appropriateness of severe sanctions.  
23 Willful misconduct is not excusable, however, regardless of whether or not the party is represented by  
24 counsel. The Court concludes, however, that imposition of additional monetary sanctions against  
25 Defendant Morse should be sufficient to cause him to comply with his discovery obligations and with  
26 court orders. If not, then more severe sanctions, including default and dismissal, will be entertained.

27 The Court, having considered and weighed all of the factors in this matter, concludes that  
28 imposition of the severe sanction of striking Defendant Morse's answer and counterclaim is not

1 justified by the circumstances. The Court, however, does not accept Defendant Morse's assertion that  
2 he did not receive the notice of the deposition mailed and faxed to him on February 26, 2007.  
3 Therefore, Defendant Morse's failure to timely contact Defendant's counsel prior to March 14, 2007 to  
4 either confirm the date for his deposition or to seek a brief postponement until on or before March 21,  
5 2007 is not excusable and warrants the imposition of further sanctions. Accordingly,

6 **IT IS HEREBY ORDERED** that the *Emergency Plaintiff's Motion For Order of Contempt and*  
7 *Sanctions Against Defendant Morse Pursuant to FRCP 37 (#30)* is **granted and denied**, in part, as  
8 follows:

9       1. Defendant Clare Morse is hereby ordered to appear for his deposition on or before  
10 March 30, 2007, at a date and time to be noticed by Plaintiff's counsel, which notice of deposition shall  
11 be served on Defendant's counsel Matt Pawlowski, Esq.

12       2. Plaintiff is awarded its reasonable attorney' fees and costs incurred in noticing  
13 Defendant Morse's deposition for March 14, 2007 and the reasonable attorneys fees and costs incurred  
14 by Plaintiff in regard its *Emergency Plaintiff's Motion For Order of Contempt and Sanctions Against*  
15 *Defendant Morse Pursuant to FRCP 37 (#30)*. Counsel for Plaintiff shall, no later than 15 days from  
16 entry of this order, serve and file a memorandum, supported by the affidavit of counsel, establishing the  
17 amount of attorney's fees and costs incurred in the matters addressed in this order. The memorandum  
18 shall provide a reasonable itemization and description of the work performed, identify the attorney(s) or  
19 other staff member(s) performing the work, the customary fee of the attorney(s) or staff member(s) for  
20 such work, and the experience, reputation and ability of the attorney performing the work. The  
21 attorney's affidavit shall authenticate the information contained in the memorandum, provide a  
22 statement that the bill has been reviewed and edited, and a statement that the fees and costs charged are  
23 reasonable.

24       3. Counsel for Defendant shall have 15 days from service of the memorandum of costs and  
25 attorney's fees in which to file a responsive memorandum addressing the reasonableness of the costs  
26 and fees sought, and any equitable considerations deemed appropriate for the court to consider in  
27 determining the amount of costs and fees which should be awarded.

28 . . .

1           4. Counsel for Plaintiffs shall have 11 days from service of the responsive memorandum in  
2 which to file a reply.

3           **IT IS FURTHER ORDERED** that in addition to the award of attorney's fees and costs  
4 incurred by Plaintiff in filing its *Emergency Plaintiff's Motion For Order of Contempt and Sanctions*  
5 Against Defendant Morse Pursuant to FRCP 37 (#30), an additional sanction, in the form of a fine in  
6 the amount of One Thousand Dollars (\$1,000.00), is awarded against Defendant Morse. Defendant  
7 shall pay this sanction within 30 days from the filing of this Order.

8           **IT IS FURTHER ORDERED** that if Defendant has not yet paid the sanctions awarded against  
9 him in the Court's order (#29), filed on February 26, 2007, he shall do so within 30 days of the filing of  
10 this Order.

11       **IT IS FURTHER ORDERED** that if Defendant Morse fails to appear for his deposition as  
12 renoted by Plaintiff for a date and time on or before March 30, 2007, or to pay the sanctions imposed  
13 upon him, the Court shall recommend that Defendant Morse's answer and counterclaim be stricken and  
14 that his default be entered.

15 DATED this 23rd day of March, 2007.

*George Foley Jr.*  
GEORGE FOLEY, JR.  
U.S. MAGISTRATE JUDGE